

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

SCEPTER INGOT CASTINGS, INC.

and

Case 26-CA-17345

SHOPMAN'S LOCAL UNION NO. 733 OF THE
INTERNATIONAL ASSOCIATION OF BRIDGE,
STRUCTURAL AND ORNATMENTAL IRON
WORKERS, , AFL-CIO

Rosalind Eddins, Esq., for the General Counsel.
Ronald G. Ingham, and Ian K. Leavy Esqs., for the Respondent.
Mr. Edward Cottongim, for the Charging Party.

SUPPLEMENTAL DECISION

George Carson II, Administrative Law Judge: This case was submitted by stipulation dated August 14, 2003, and filed on August 17, 2003. On September 2, 2003, Associate Chief Administrative Law Judge William N. Cates issued an order accepting the stipulation and assigned the matter to me. The only issue is whether a unilateral wage increase instituted by the Respondent should be an offset to its liability for a unilateral increase in the cost of employee health care benefits that the Respondent imposed upon its employees.

On the entire record, and after considering the position statements of all parties and the briefs filed by the General Counsel and the Respondent, I make the following

Findings of Fact

I. Procedural History

On July 16, 1997, Administrative Law Judge Richard J. Linton issued a decision in which he found that the Respondent violated the National Labor Relations Act by, inter alia, withdrawing recognition from the Union, unilaterally granting pay raises, and unilaterally changing medical insurance coverage or rates for bargaining unit employees. His recommended order, in subparagraph 1(b), required the Respondent to cease and desist from unilaterally granting pay raises. In subparagraph 1(c), the Respondent was ordered to cease and desist from unilaterally changing medical coverage or rates. Judge Linton's recommended order, at subparagraph 2(f), provided that the Respondent, if requested by the Union, must "rescind either or both of the early October 1995 unilateral changes concerning wage rates and medical insurance coverage." On August 28, 2000, in *Scepter Ingot Castings*, 331 NLRB 1509 (2000), the Board adopted Judge Linton's findings but modified his recommended order by inserting an additional subparagraph, 2(g), that provides:

(g) Make employees whole for any expenses ensuing from the Respondent's unilateral changes in medical insurance coverage and contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891, fn. 2 (1980), enf'd. 661 F.2d 940 (9th Cir. 1981), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Id. at 1510.

On February 22, 2002, the Court of Appeals for the District of Columbia Circuit entered a judgment enforcing the Board's Order without any modification. *Scepter Inc. v. NLRB*, 280 F.3d 1053 (D.C.Cir. 2002).

On April 8, 2003, the Regional Director for Region 26 issued a Compliance Specification alleging the amounts due to employees under the Board's Order. The parties have stipulated that the amounts set out in Appendix A are the amounts due to the employees if the Respondent is not permitted to offset the medical insurance contribution by the wage increase.

The Respondent filed a timely answer to the Compliance Specification on April 28, 2003, and, on May 16, 2003, filed an amended answer. The amended answer affirmatively pleads the offset. Its calculations reflect that the unilateral wage increase more than covered the insurance contribution costs of employees who worked for more than 2,080 hours annually.

The parties have stipulated that the foregoing decisions and pleadings, together with the Respondent's October 4, 1995, Memo to Employees, constitute the entire record. That memorandum announces the implementation of insurance cost contributions effective October 1, 1995, and thereafter states:

To help offset this new employee contribution, your rate of pay will be increased by \$.15 per hour effective 1200 am, October 2, 1995. This pay rate adjustment is a one time adjustment and will be reflected in the pay rate schedule published in a separate document.

II. Contentions of the Parties

The Stipulation sets out the contentions of the parties. The Respondent contends that the 15 cent per hour pay increase announced in its memorandum "was identified to bargaining unit employees as an offset to their medical premium contributions," that there has been no adverse economic impact upon the employees, and that it is not liable for the amounts set forth in Appendix A of the Compliance Specification.

In its brief, the Respondent predicates its arguments upon the proposition that "the employees would not have received the increased wages if the Respondent had not required contributions to the Health Plan." The foregoing proposition fails to note that each action violated the Act. The Board specifically found two separate unilateral changes that each constituted a separate unfair labor practice.

The Respondent cites *Florida Steel Corp.*, 273 NLRB880 (1984), noting that, in that case, amounts paid in partial compliance with a Board Order were to be taken into account when determining the final amount of liability. In the instant case, no amounts have been paid in partial compliance with the Board Order.

None of the additional cases cited by the Respondent relate to the issue presented herein. In *Banknote Corp. of America*, 327 NLRB 625 (1999), the Board affirmed the administrative law judge's determination that an employer "need not reimburse employees to the extent that it required them to contribute to the new insurance plan." *Id.* at 628. That case involved a successor employer that was privileged to set initial terms and conditions of employment. The employer initially informed employees that their current health plan would be continued for 60 days. Although it altered the plan prior to the end of the 60-day period, employees were not required to contribute until after the 60-day period. *United States Can Co.*, 328 NLRB 334 (1999), *enfd.* 254 F.3d 626 (7th Cir. 2001), discussed offsets for retirement and

supplemental unemployment benefits. It did not address a claimed offset for a wage increase unlawfully granted pursuant to a separate unilateral change in employees' working conditions.

The General Counsel and the Union contend that the 15-cent per hour increase violated the Act "and should not be considered as an offset for the other unilateral change (employee contribution toward premiums)."

The General Counsel, citing *Intermountain Rural Electric Assn.*, 317 NLRB 588 (1995), enf'd. 83 F.3d 432 (1996), argues that the Respondent should not be permitted to "reap the fruits of its unlawful action." The Board, in holding that the financial harm caused by the respondent's modification of the overtime selection process in that case was "distinct from the financial impact of the Respondent's other unfair labor practices," states:

Thus, the fact that the Respondent may have provided backpay to employees who suffered losses as a result of the unlawful unilateral changes pertaining to premium pay eligibility and insurance premium obligations does not relieve the Respondent of liability for the financial consequences of its change in the callout and standby overtime selection procedures. Contrary to the judge, therefore, we find that the presumption that some backpay is due to remedy the effects of the Respondent's unlawful action is properly applied in this case. *Id.* at 590.

III. Analysis and Concluding Findings

The Respondent, in arguing that its unlawful wage increase compensated employees for the cost of its unlawfully imposed insurance contribution, is arguing "no harm, no foul." That argument ignores that there were two fouls, the unilateral contribution requirement and the unilateral wage increase. Accepting the figures in the Respondent's amended answer, the wage increase fully offset the employee insurance contribution for employees who worked for 2,080 hours. Thus, the Respondent could have, without making any unilateral changes, simply paid the increased insurance cost. The Respondent chose not to do so. Instead, the Respondent unilaterally imposed employee contributions for insurance contemporaneously with its withdrawal of recognition from the Union in early October 1995, and, in further in derogation of its bargaining obligation, it simultaneously announced that it was increasing wages to "offset this new employee contribution."

In arguing that the unilateral wage increase should be applied as an offset, the Respondent is seeking to reduce its liability for its own wrongdoing, the unilateral institution of insurance contributions, by its separate wrongful act of increasing wages without notice to or bargaining with the employees' certified collective bargaining representative. The foregoing actions were taken contemporaneously with its unlawful withdrawal of recognition from the Union. The Board, in adopting the cease and desist provisions of Judge Linton's recommended order, found that the foregoing unilateral actions constituted separate violations as reflected in its Order which, in subparagraph 1(b), requires the Respondent to cease and desist from unilaterally granting pay raises, and, in subparagraph 1(c), requires the Respondent to cease and desist from unilaterally changing medical insurance coverage or rates.

Judge Linton's decision specifically notes that the Respondent, in its memo of October 4, 1995, informed employees that the wage increase was "[t]o help offset' the new contribution now required from employees." *Scepter Ingot Castings*, supra at 1514. Despite this, Judge Linton found that each of the unilateral changes separately violated the Act. His recommended Order, at subparagraph 2(f), provided that, if requested by the Union, the Respondent must "rescind either or both of the early October 1995 unilateral changes concerning wage rates and medical insurance coverage." [Emphasis added.] The Board adopted that portion of Judge

Linton's recommended Order without modification. The absence of any modification is fully consistent with established precedent that nothing in remedial orders relating to unilateral changes "is to be construed to require the Respondent to withdraw any benefit previously granted unless requested by the Union." *Wire Products Mfg. Corp.*, 328 NLRB 855 at fn. 2 (1999). See also *U.S. Marine Corp.*, 293 NLRB 669, 671 at fn. 6 (1989). Rather than simply adopting Judge Linton's recommended order permitting the Union to request rescission of either or both of the unilateral changes, the Board specifically inserted a new paragraph, subparagraph 2(g), providing that the Respondent "[m]ake employees whole for any expenses ensuing from the Respondent's unilateral changes in medical insurance coverage and contributions." There is no language relating to any potential offsets. The Board's Order was enforced without modification by the Court of Appeals.

In *Grinnell Fire Protection Systems Co.*, 337 NLRB No. 20 (2001) the Board, citing longstanding precedent, explained that it has no authority to modify an enforced order because "Section 10(e) of the Act provides that upon the filing of the record in a United States court of appeals, 'jurisdiction of the court shall be exclusive and its judgment and decree shall be final ...'" *Id.*, slip op. at 2.

The Board's Order, enforced by the Court of Appeals, finds two separate and distinct unilateral changes and provides that, upon the request of the Union, either or both of those changes must be rescinded. It further provides, with no mention of offsets, that employees be made whole "for any expenses ensuing from the Respondent's unilateral changes in medical insurance coverage and contributions."

The parties have stipulated that, in the event the Respondent is not permitted to offset the medical insurance increase by the wage increase, the amounts set out in Appendix A of the Compliance specification are the amounts due to the employees.

In view of the foregoing and on the entire record, I issue the following recommended¹

ORDER

The Respondent, Scepter Ingot Castings, Inc., New Johnsonville, Tennessee, its officers, agents, successors, and assigns, shall make whole the employees named in Appendix A of the Compliance Specification by payment to them of the amounts set forth therein, together with interest thereon accrued to the date of payment computed in the manner described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Dated, Washington, D.C. October 15, 2003.

George Carson II
Administrative Law Judge

¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.